In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 614

JOSEPH RICHARD WICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A 1–4) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1969. The petition for a writ of certiorari was filed on September 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether brief statements by a government witness at trial and by the prosecutor in summation, to the effect that during police custodial interrogation peti-

tioner refused to state where he had obtained counterfeit notes, constituted harmless error.

STATEMENT

In a jury trial in the United States District Court for the Southern District of Illinois petitioner was convicted on Counts I and II of passing two counterfeit $10 bills in separate transactions in violation of 18 U.S.C. 472, and was acquitted on Count III charging possession of 28 counterfeit $10 bills (Tr. 264).[1] On October 17, 1968, petitioner was given concurrent sentences of imprisonment for four years on Counts I and II. On appeal the conviction was affirmed (Pet. App. A 1–4).

1. The evidence shows that on August 11, 1966, petitioner drove Joseph Foley and Norine Greenberg in his 1961 Dodge from St. Louis, Missouri to Edwardsville, Illinois (Tr. 163, 165–167, 181–182). In Edwardsville petitioner and Foley went to a card shop, where each man purchased a card with a counterfeit $10 bill (Govt. Ex. 1; Tr. 27, 31, 38–40, 150, 187–188). About ten minutes later the employee at the card shop noticed that the two bills had the same serial number and notified the police (Tr. 36–38).

That same day, petitioner went to a nearby clothing store where he gave the owner a counterfeit $10 bill (Govt. Ex. 2) for the purchase of a $1.00 pair of socks. The owner, believing the bill to be counterfeit, asked

[1] We are filing with the Clerk of this Court a certified copy of the transcript of the trial testimony, to which we shall refer as "Tr." We are also filing copies of the indictment and the commitment.

an employee to call the police. He then followed petitioner to his Dodge automobile as the latter was placing his purchase in the car. The store owner advised petitioner that he could not accept the bill because it was counterfeit. Petitioner returned to the store. A police officer then arrived and the owner gave him the counterfeit bill. Petitioner was placed under arrest (Tr. 5–10, 23, 50–51, 150–151, 187–188).

Petitioner and Foley, who meanwhile had also been arrested, were placed in a police car (Tr. 54–58). After the police drove around and saw Norine Greenberg sit down in the Dodge, they took her to the police station with petitioner and Foley to await arrival of federal agents (Tr. 63–64). That same day at the police station the employee of the card shop identified petitioner and Foley as the men who had passed two counterfeit bills to her (Tr. 29–30, 39).

2. On direct examination of Secret Service Agent Colquhoun, testifying as to the questioning of petitioner at the police station, after his warnings as to silence and to counsel (see Pet. App. A 2), the following colloquy occurred (Tr. 155):

> Q. Would you tell the Court and jury what those questions were and the answers, if you recall?
>
> A. He was asked where he obtained the counterfeit notes, and he refused to give an answer to that question.
>
> Mr. SHAW [petitioner's counsel]. All right. Now, if Your Honor please, I'm going to ask that the jury be discharged and a mistrial be declared.

The COURT. Objection overruled. Proceed, gentlemen.

Shortly thereafter, *on cross-examination by defense counsel of this same witness*, the following occurred (Tr. 161–162):

Q. * * * did you ask the Defendant, Joseph Wick, if Exhibit 2, which I now hand you—did you ask him if he knew whether or not that was counterfeit?

A. I did.

Q. What did he say?

A. He wouldn't answer.

* * * * *

Q. Did you—did he say that he knew this was counterfeit?

A. He said he wouldn't answer that question.

Mr. SHAW [petitioner's counsel]. Again, I'm going to ask Your Honor, on the basis of his direct examination, that this case—that a mistrial be declared and the jury discharged.

The COURT. Overruled.[2]

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[2] When agent Allen questioned petitioner at the police station petitioner did state that the Dodge convertible was his, and that he did not know the woman, Mrs. Greenberg (Tr. 109–110, 114–117). Mrs. Greenberg later testified that she was petitioner's sister (Tr. 181).

On the day following the questioning of petitioner at the police station agent Colquhoun was called to the garage where petitioner's Dodge had been driven. The agent took from the Dodge a box containing 25 counterfeit $10 bills (Govt. Exhibits 4, 5) which a garage employee had found in the glove compartment (Tr. 140–145, 158–161, 187–188).

The following transpired during the prosecutor's closing argument to the jury (Tr. 221–222):

> Then Mr. Colquhoun took the stand, told us about being at the Police Station, and that he came in, actually, when Mr. Allen talked to Mr. Wick [petitioner] and they—he overheard—Mr. Allen asked the questions and Mr. Wick give some answers, and specifically that when he asked him about any counterfeit, Mr. Wick said he didn't want to answer.

In his closing instructions, the trial judge pointed out *inter alia* that "Statements and arguments of counsel are not evidence" (Tr. 254).

ARGUMENT

As the court of appeals recognized it was error for the government to adduce evidence and make comment in closing argument that, during questioning at police headquarters following a warning as to his rights, petitioner refused to answer questions concerning the counterfeit bills. See *Miranda* v. *Arizona*, 384 U.S. 436, 468, n. 37; *Griffin* v. *California*, 380 U.S. 609. Nevertheless, we submit that the court below correctly ruled that this error was harmless in the circumstances of this case.

The evidence as to petitioner's guilt, summarized in the Statement, was so overwhelming as to support the conclusion of the court below that the brief comments concerning petitioner's silence constituted harmless error beyond a reasonable doubt. See *Harrington* v. *California*, 395 U.S. 250. *Chapman* v. *California*, 386 U.S. 18, where the Court found comment upon defendants' failure to testify prejudicial error,

is not to the contrary. In *Chapman* both the prosecutor and the judge commented extensively on defendants' refusal to testify. The broad extent of the comment in *Chapman* is shown by this Court's observation that "the state prosecutor's argument and trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that by their silence petitioners had served as irrefutable witnesses against themselves" (386 U.S. at 25). The situation in this case was significantly different. The reference by the agent witness to petitioner's refusal to answer a question about counterfeit money was a brief and isolated exchange. After the witness made the statement, government counsel did not pursue that line of questioning. Indeed, it was on cross-examination that petitioner's counsel, in asking several questions of the witness pertaining to petitioner's refusal to answer the question, emphasized his client's reliance upon his Fifth Amendment privilege (Tr. 161–162). The prosecutor's isolated comment in summation (Tr. 221–222) was also brief.

Furthermore, the jury's acquittal of petitioner on Count III strongly suggests that the jury predicated its verdict on the evidence in the case, and not on any incidental references to petitioner's silence. In fact, in his closing instructions the trial court specifically admonished the jury that "A defendant has the absolute right not to testify, and the jury must not draw a presumption of guilt or any inference against the

Defendant because he did not testify" (Tr. 255). As the court of appeals pointed out (Pet. App. A 4), the jury could reasonably infer that this instruction referred not only to the fact that petitioner had not testified at his trial, but also to his refusal to answer a question about the counterfeit bills during his interrogation at police headquarters.[3]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] Even though defense counsel objected to this instruction at trial (Tr. 210–211), the court did not err in giving it *sua sponte*, since it was helpful to petitioner rather than prejudicial. *United States* v. *Agueci*, 310 F. 2d 817, 830–831 (C.A. 2), certiorari denied, 372 U.S. 959; *United States* v. *Garguilo*, 310 F. 2d 249, 252 (C.A. 2); *United States* v. *Di Carlo*, 64 F. 2d 15, 17–18 (C.A. 2); *United States* v. *De Vasto*, 52 F. 2d 26, 30 (C.A. 2), certiorari denied, 284 U.S. 678; *United States* v. *Schwartz*, 398 F. 2d 464, 469–470 (C.A. 7), certiorari denied *sub nom. Pyne* v. *United States*, 393 U.S. 1062; *Hanks* v. *United States*, 388 F. 2d 171, 175 (C.A. 10), certiorari denied, 393 U.S. 863.

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